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NO. 92-1216

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1992

JOHN J. HESS,
Petitioner

v.

PENNSYLVANIA STATE SYSTEM
OF HIGHER EDUCATION,
Respondent

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner met his burden of proving pretext in this reverse sex discrimination claim under the Equal Pay Act.

JURISDICTIONAL STATEMENT

Respondent accepts petitioner's jurisdictional statement except for the citation to Supreme Court Rule 17, which has nothing to do with this case.

STATUTORY PROVISION INVOLVED

Contrary to petitioner's inexplicable statement, Pet. at 2, this case does not involve the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-638. It involves Section 206(d)(1) of the Equal Pay Act, 29 U.S.C. § 206(d)(1):

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a

> differential based on any other factor other than sex....

29 U.S.C. § 206(d)(1).

STATEMENT OF THE CASE

Petitioner, John Hess, seeks review of the affirmance of the grant of judgment as a matter of law, pursuant to Fed.R.Civ.P. 50(a), in favor of his employer, the respondent State System of Higher Education (SSHE). The district court had jurisdiction based upon 28 U.S.C. §§ 1331 and 1337. Hess, a male university police officer II, alleged reverse gender discrimination under the Equal Pay Act, 29 U.S.C. § 206(d)(1). He claimed that SSHE promoted a female to officer II and gave her a promotion delay resulting in her receipt of a higher salary than his, solely because of her gender.

At trial,[1] Hess showed evidence that

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[1]Hess' claim that SSHE agreed on elements of a prima facie case is a misstatement. SSHE conceded for purposes (continued...)

a female officer was promoted to a position with the same title as Hess', that the campus personnel director delayed her promotion, and that she earned more than Hess.[2] Hess called the personnel director as an adverse witness, thus permitting SSHE to explain the salary differential and promotion delay.

During the case-in-chief, SSHE presented an uncontroverted reason other than gender for the pay differential. 5a-7a. SSHE showed that the promotion was pursuant to a job and pay classification in a collective bargaining agreement. 4a. While Hess did not know the reason for the

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[1](...continued)
of its summary judgment motion alone that Hess could establish a prima facie case but could not show that SSHE's proffered reason other than gender for the salary differential was pretextual.

[2]Hess misstates that the female received an earlier promotion which was then revoked and delayed.

promotion delay, (R.232-35a), the personnel director testified that he authorized it in the interest of employee morale and in response to the recommendation of the police chief.[3] 6a (R. 192a, 197a, 207a, 260a).

Hess' own testimony controverted his conclusory claim that the police chief favored females. (R. 236a) Hess conceded that the promoted woman was the bidding officer with the most seniority and therefore postured for the promotion. (R. 232-33a). The collective bargaining agreement, implemented irrespective of gender, rendered Hess and other officer

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[3]A retroactivity memorandum, admitted as a joint exhibit, showed that contrary to the director's belief at the time, the promotion delay did not affect the female's salary. She would have earned retroactively the same higher salary even if her promotion were not delayed. (R. 199a, 248a).

IIs ineligible to apply for the position. (R. 213-14a).[4]

SSHE moved for judgment as a matter of law, pursuant to Fed.R.Civ.P. 50(a), based upon alternative theories: 1) lack of a prima facie case; and 2) lack of evidence of pretext to controvert SSHE's evidence of a reason other than gender for the pay difference, adduced during the case-in-chief. Analogizing to a prevalent standard under Title VII, 42 U.S.C. § 2000(e), reverse discrimination cases, the district court held that Hess had a

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[4]Although Hess now claims that he had no opportunity to discredit the defense, the trial court gave him multiple opportunities. It let him exceed the scope of cross-examination on redirect in order to respond to its concern about lack of evidence of discrimination. (R. 244a). The court even offered to continue the trial for Hess to present evidence of actual discrimination or a discriminatory work environment, but Hess' counsel stated, "We have nothing new." (R. 276a).

heightened burden of proof to establish a prima facie case. It reasoned that, as a member of a historically favored group, Hess had to show either a discriminatory work environment or actual discrimination, i.e. that the promotion was related to gender. The court held that he failed to do so. (R. 260a, 253-64a, 272a, 280-82a).

On appeal, the Third Circuit held that SSHE had proffered an exception to the Equal Pay Act and that Hess had failed to meet his burden of showing pretext for unlawful gender discrimination against males. 9a. The appellate court equated the district court's added requirement for a prima facie case with the evidence needed to show pretext. 9a. Once SSHE had proffered a reason other than gender during Hess' case-in-chief, Hess' failure to show actual discrimination or a discriminatory work environment

constituted a failure to meet his burden of proving pretext. 9a-10a.

Thus, the appellate court did not consider SSHE's arguments that Hess failed to establish a prima facie case due to lack of evidence of job equality and discrimination.[5] 3a, 11a.

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[5]Hess misstates that the parties agreed that the jobs were equal.

REASONS FOR DENYING THE WRIT

Hess is incorrect in stating that there is a conflict among the circuits with respect to the legal holding. Although the district court granted a directed verdict based upon its novel theory on gender-related differences in the requirements of a prima facie case under the Equal Pay Act, the Third Circuit did not reach, and had no need to reach this issue. No appellate court has addressed this issue. The Third Circuit applied settled, not novel, principles of law. The crux of its holding rests upon analysis of the facts of the case.

I. THE ISSUE OF WHETHER HESS MET HIS BURDEN OF PROVING PRETEXT WAS PROPERLY RESOLVED BY ROUTINE APPLICATION OF ESTABLISHED PRINCIPLES.

The appellate court reviewed Hess' fact-intensive arguments about the

female's promotion and promotion delay. Presuming without deciding that Hess presented a prima facie case, it held that SSHE presented an affirmative defense which Hess did not counter. See Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (burdens of proof in Equal Pay Act case). It concluded as a matter of law that Hess failed to adduce a minimum quantum of evidence to controvert SSHE's proffered reason other than gender for the challenged salary differential. See Fed.R.Civ.P. 50(a); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) (directed verdict standard).

Although Hess claims a prima facie case and disputes the application of the directed verdict standard, in employment cases,

> grants of directed verdicts ... are proper even if the plaintiff has made out a

> prima facie case as long as plaintiff's case-in-chief also contains evidence sufficient to meet defendant's burden ... and the evidence overall at the close of plaintiff's case is insufficient to allow a rational jury to find for the plaintiff.

MacPherson v. University of Montevallo, 922 F.2d 766, 772 n.10 (11th Cir. 1991)(citations omitted); EEOC v. State of Delaware DHSS, 865 F.2d 1408, 1414 and n.9 (3d Cir. 1989) (judgment as a matter of law proper in Equal Pay Act case when employer's affirmative defense established "so clearly that no rational jury could have found to the contrary"); see United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714-15 (1983) (once employer rebuts prima facie case, presumptions drop in Title VII case).

Disagreements over the application of well-settled legal principles to specific

cases do not merit the Court's discretionary review. Since the appellate court's decision is not controversial, this Court should deny certiorari.

CONCLUSION

For these reasons, the respondent asks the Court to deny the writ of certiorari.

Respectfully submitted,

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